

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

GRAYS HARBOR ADVENTIST
CHRISTIAN SCHOOL, a Washington
non-profit organization; GREG G.
BOGDANOVICH, an individual; MARY
LAFOREST, an individual, BRUCE
KELLY, an individual, MARK NEUSER,
an individual, ARLAN HINKELMANN,
an individual, MARCIA HINKELMANN,
an individual, JEFF DOUGHERTY, an
individual, FRANK ZINN, an individual,
HARVEY OPALESKI, an individual, and
JAMES NOGOSEK, an individual, on
behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

CARRIER CORPORATION, a Delaware
corporation,

Defendant.

Case No. NO. 05-05437 RBL

**ORDER GRANTING CLASS COUNSEL'S
APPLICATION FOR AWARD OF
ATTORNEYS' FEES AND COSTS AND
SERVICE AWARDS TO THE NAMED
PLAINTIFFS**

Date: April 22, 2008
Time: 8:30 a.m.
Courtroom: B
Judge: Ronald B. Leighton

1 Plaintiffs' Application For An Award of Attorneys' Fees and Costs and Service Awards
 2 for the Named Plaintiffs (the "Fee Application") came before the Court for hearing on April 22,
 3 2008, pursuant to this Court's November 20, 2007 Order (1) Granting Preliminary Approval to
 4 the Proposed Settlement; (2) Provisionally Certifying the Proposed Settlement Class; (3)
 5 Approving the Proposed Notice Plan and Forms of Notice; and (4) Scheduling the Final
 6 Fairness Hearing (the "Preliminary Approval Order"). The Court has read and considered the
 7 Fee Application, all supporting declarations and all other materials relating to the Fee
 8 Application, including all materials submitted in opposition to the Fee Application.

9 As a general matter, the Ninth Circuit has held that in the context of class action
 10 settlements, courts have the discretion to choose either the "lodestar/multiplier" method or the
 11 "percentage" method to determine a reasonable attorneys' fee. *Hanlon v. Chrysler Group*, 150
 12 F.3d 1011, 1029 (9th Cir. 1998). However, numerous courts within the Ninth Circuit have held
 13 that when state substantive law applies, attorneys' fees are to be awarded in accordance with
 14 state law. *Vizcaino v. Microsoft Corp.*, 142 F.Supp.2d 1299, 1302 (W.D. Wash. 2001) (citing
 15 cases). Because Washington is the forum state, Washington law should be applied to the
 16 determination of an appropriate fee award. *Id.* Washington law recognizes both the lodestar
 17 method and the percentage of the fund method for determining appropriate attorneys' fees.
 18 *Bowles v. Department of Retirement Systems*, 121 Wash.2d 52, 72-73 (1993). "Under the
 19 lodestar/multiplier method, the district court first calculates the 'lodestar' by multiplying the
 20 reasonable hours expended by a reasonable hourly rate. *See generally Bowers v. Transamerica*
 21 *Title Ins. Co.*, 100 Wash.2d 581, 597-99 (1983). The court may then enhance the lodestar with
 22 a 'multiplier,' if necessary, to arrive at a reasonable fee." *Id.*; *see also In re Wash. Pub. Power*
 23 *Supply Sys. Sec. Litig.* ("WPPSS"), 19 F.3d 1291, 1295 fn.2 (9th Cir. 1994) (citations omitted).
 24 "Under the percentage method, the court simply awards the attorneys a percentage of the funds
 25 sufficient to provide plaintiffs' attorneys with a reasonable fee." *WPPSS*, 19 F.3d at 1295 fn.2.

(citations and quotation marks omitted). The Ninth Circuit has held that regardless of whether a court “applies the lodestar or the percentage method, ‘we require only that fee awards in common fund cases be reasonable under the circumstances.’” *Id.* (quoting *Florida v. Dunne*, 915 F.2d 542, 545 (9th Cir. 1990)); *see also Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003). Where, as here, Settlement relief will be paid on a claims made basis with no cap to the relief available, consideration of attorneys’ fees lends itself more readily to the lodestar method. Because the attorneys’ fees will be paid separately by Carrier without reducing the relief available to the Class, the lodestar method is appropriate. *Bowles*, 121 Wash.2d at 72-73.

I. THE REQUESTED AWARD OF ATTORNEYS’ FEES IS APPROPRIATE UNDER THE LODESTAR METHOD

The Ninth Circuit has enumerated factors to be considered in determining the appropriateness of a fee using the lodestar method. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975); *see also Hanlon*, 150 F.3d at 1029. In approving a fee request under the lodestar method, trial courts should consider:

(1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the requisite legal skill necessary; (4) the preclusion of other employment due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount at controversy and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the ‘undesirability’ of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

(*Id.*) The Court has considered these factors in the present case to determine that the requested award of attorneys’ fees and reimbursement of expenses is appropriate. The Court finds that the amount of fees and costs awarded herein is fair and reasonable to the Class in light of the result achieved, the effort that was spent, the complexity of the issues presented, and the numerous risks faced by Class Counsel in obtaining a successful result. Specifically, the Court

1 finds, based on the record submitted, that the attorneys' fees awarded herein are justified in
2 light of, *inter alia*, the following factors:

3 Time and Labor Required: The 18,728 hours Plaintiffs' Counsel collectively
4 expended on this case were reasonably spent. Plaintiffs' Counsel: (1) investigated and filed
5 this action and the related actions in Michigan, Minnesota, and Wisconsin; (2) successfully
6 moved for class certification in the Washington action and defeated Carrier's motion for
7 decertification; (3) took and defended more than 50 depositions; (4) coordinated multiple
8 furnace inspections; (5) engaged multiple experts to assess the nature and scope of the defect
9 and prepared a model of classwide damages; (6) propounded and responded to voluminous
10 discovery; (7) reviewed tens of thousands of documents; (8) prepared for and attended the
11 mediation; (9) settled the case and documented the Settlement; (10) successfully moved for
12 preliminary approval of the Settlement; and (11) worked with the notice provider and defense
13 counsel to respond to Class Member questions concerning the Class Notice.¹

14 Class Counsel provided summary reports of each firm's lodestar with their Fee
15 Application on March 18, 2008 and later supplemented those records with detailed time
16 reports, which Class Counsel submitted for *in camera* review. Based on a review of those
17 lodestar reports, the Court is satisfied that the time and labor Class Counsel expended is
18 reasonable and supports their request for an award of attorneys' fees. Significantly, no party or
19 objector has challenged the reasonableness either of the hours committed to this case or the
20 rates charged by the lawyers and their firms.

21 The Novelty and Difficulty of the Questions Involved: The Court recognizes
22 that defective product class actions are complex and involve risk. This case is particularly
23 complex because it involves multiple related cases proceeding in parallel actions in four U.S.
24 jurisdictions. In addition, Plaintiffs' claims involve dozens of furnace models, some of which
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¹ (See Declarations of Selbin ¶ 7, Stephens ¶¶ 12-18, Pines ¶ 19, and Woodward ¶ 5.)

1 have been on the market for nearly 20 years. The difficulty of the questions involved is
 2 demonstrated by the posture of the Wisconsin action. At the time of Settlement, Plaintiffs'
 3 appeal of the Wisconsin court's denial of class certification was pending. Any appellate
 4 proceeding involves risk to both parties. The outcome of Plaintiffs' appeal in Wisconsin was
 5 by no means clear. The Court finds that the novelty and difficulty of the questions involved
 6 here favor final settlement approval.

7 The Preclusion of Other Employment: The Court is satisfied that the demanding
 8 and contentious nature of this action precluded Class Counsel from accepting other potentially
 9 profitable work.²

10 The Customary Fee: The modest multiplier requested by Class Counsel falls
 11 well within the range of multipliers approved by Ninth Circuit courts. *See Vizcaino*, 290 F.3d
 12 at 1052–54 (approving multiplier of 3.65 and citing a survey of class settlements from 1996-
 13 2001 indicating that most multipliers range from 1.0 to 4.0). In light of the range of multipliers
 14 commonly approved by courts within the Ninth Circuit, Plaintiffs' fee request is reasonable.
 15 Class Counsel provided summary reports of each firm's lodestar with their Fee Application on
 16 March 18, 2008 and later supplemented those records with detailed time reports, which Class
 17 Counsel submitted for *in camera* review. Based on a review of those records, the Court finds
 18 that Class Counsel's hourly rates are reasonable for their skill and the work they performed.
 19 The resulting lodestar multiplier of 1.24 is fair and reasonable in light of the relevant factors
 20 identified and addressed herein.

21 Whether the Fee is Contingent: Class Counsel undertook this class action on a
 22 purely contingent basis, with no assurance of recovering expenses or attorneys' fees.³ Despite
 23 this lack of assurance, Class Counsel expended considerable time and resources to prosecute
 24 the case successfully on behalf of the Class.

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² (See Declarations of Selbin ¶ 13, Stephens ¶ 22, and Woodward ¶ 9.)

³ (See Declarations of Selbin ¶ 12, Stephens ¶ 19, Pines ¶ 20, and Woodward ¶ 9.)

1 The Results Obtained: As discussed in detail in this Court's Order Granting
 2 Final Approval of Class Action Settlement, entered concurrently, the Court is satisfied that the
 3 Settlement provides Class Members with substantial benefits by providing cash compensation
 4 for past CHX failures and a forward-looking enhanced warranty provision that will provide
 5 free parts and labor for replacement CHXs at any time within 20 years of installation of the
 6 furnace. In addition, Class Counsel will continue to invest time and resources in this matter
 7 throughout (and beyond) the claims period, which runs until August 2008. Class Counsel's
 8 ongoing responsibilities will include assisting Class members with claims administration issues
 9 and overseeing the enhanced warranty program, which will be in effect for nearly 20 years for
 10 some class members.

11 The Experience, Reputation and Ability of the Attorneys: The Court is satisfied
 12 that the reputation, experience, and ability of Class Counsel were essential to success in this
 13 litigation. Class Counsel have substantial experience in consumer class action litigation.⁴
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⁴ (See Declarations of Selbin ¶ 2, Ex. A; Stephens ¶¶ 2-8, Pines ¶¶ 2-17, and Woodward ¶ 4, Ex. A.)

1 **II. CLASS COUNSEL'S REQUEST FOR REIMBURSEMENT OF COSTS IS**
 2 **REASONABLE**

3 The Court further finds that Class Counsel's request for reimbursement of costs is also
 4 reasonable. Throughout the course of this litigation, Class Counsel incurred out-of-pocket
 5 costs totaling \$1,590,583.75.⁵ The Ninth Circuit allows recovery of pre-settlement litigation
 6 costs in the context of class action settlement. *Staton*, 327 F.3d at 974. Where, as here, the
 7 requested attorneys' fees and costs will be paid in addition to (and not out of) the relief
 8 available to the Class, reimbursement of reasonable costs is fully in keeping with applicable
 9 law. Class Counsel provided summary cost reports to this Court on March 18, 2008. Class
 10 Counsel supplemented those reports on April 15, 2008 by providing the detailed the cost
 11 records underlying their cost summaries for the Court's *in camera* review. Based on a review
 12 of these records, the Court is satisfied that the requested costs are relevant to the litigation and
 13 reasonable in amount.

14 **III. THE TWO OBJECTIONS WITH REGARD TO CLASS COUNSEL'S REQUEST**
 15 **FOR ATTORNEYS' FEES LACK MERIT**

16 Of nearly half a million Class members to receive direct mailed Notice of the
 17 Settlement, which included information regarding Class Counsel's fee application, only two
 18 Class Members objected to Class Counsel's request for an award of attorneys' fees and costs in
 19 this matter. The Court has considered the two objections with regard to the requested
 20 attorneys' fees and finds that they are without merit. Moreover, neither objection, if accepted,
 21 would inure to the benefit of the Class, as fees are paid by Carrier separately from, not out of,
 22 the Class relief, such that any reduction in fees would revert back to Carrier, not the Class.
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⁵ (See Declarations of Selbin ¶ 11, Stephens ¶ 20, Pines ¶ 26, and Woodward ¶ 8.)

1 The Rucker Objection

2 Objector Marcus Rucker, represented by Edward F. Siegel, argues that (1) the payment
3 of attorneys' fees should be delayed until the end of the enhanced warranty period so that the
4 Court can evaluate the exact total value of the Settlement; and (2) Class Counsel's lodestar
5 should be reduced by the amount attributable to non-attorneys. Neither argument is persuasive.

6 First, as discussed in detail above, Class Counsel's request for attorneys' fees is
7 appropriate under the lodestar-multiplier method of determining attorneys' fees in class actions
8 such as this one. Under the lodestar analysis, Class Counsel are not required to establish the
9 exact total value of the Settlement relief to justify payment of the fee before the close of the
10 claims period. All that is required is a showing that the requested fee is reasonable. *WPPSS*,
11 19 F.3d at 1295 fn.2; *Staton*, 327 F.3d at 963. Class Counsel have made such a showing.

12 In cases where the total value of the settlement can be reasonably estimated, a court
13 applying the lodestar method to determine attorney's fees may use the percentage-of-the-fund
14 analysis as a cross-check. *Wing v. Asarco Inc.*, 114 F.3d 986, 988-990 (9th Cir. 1994). In
15 instances where the court uses the percentage-of-the-fund approach as a cross-check on its
16 lodestar analysis, the court need not be exact in its estimate of the total value of the fund. *Id.* at
17 990. While it is not necessary for the Court to cross-check the reasonableness of a lodestar-
18 based award by conducting a percentage-of-the-fund analysis, the Court has done so here. The
19 Court is satisfied that the enhanced warranty component of the proposed Settlement can be
20 conservatively valued at \$30 million. If the value of the enhanced warranty program is \$30
21 million, Class Counsel's requested fee award of \$8,359,416.25 represents 21.8% of the
22 combined total of \$38,359,416.25 (value plus fees)—a percentage that is squarely in line with
23 the Ninth Circuit's well-established 25% benchmark for attorneys' fees from a common fund
24 case. *See, e.g., Hanlon*, 150 F.3d at 1029; *Six (6) Mexican Workers v. Arizona Citrus Growers*,
25 904 F.2d 1301, 1311 (9th Cir. 1990); *Paul, Johnson, Alston & Hunt v. Gaulty*, 886 F.2d 268,

272 (9th Cir. 1989); *see also In re Coord. Pretrial Proceedings in Petrol. Prods. Antitrust Litig.*, 109 F. 3d 602, 607 (9th Cir. 1997) (recognizing that common fund awards typically range between 20-30%); *Vizcaino*, 290 F.3d at 1050, n.4. In light of the Settlement value, Objector Rucker's suggestion that payment of attorneys' fees should be delayed is unavailing.

Second, Rucker's argument that Class Counsel has embellished its lodestar by including work performed by case clerks, paralegals, law student interns, and other non-attorney staff ignores applicable law. The Ninth Circuit and Washington courts recognize that substantive case-related work performed by paralegals and other non-attorney staff may be included in the calculation of recoverable lodestar. *Morgan v. Kingen*, 141 Wn. App. 143, 164 (Wash. App. 2007); *see also Earthquake Sound Corp. v. Bumper Industries*, 352 F.3d 1210 (9th Cir. 2003) (upholding lodestar-based fee award that included work performed by attorneys, paralegals, and clerks). The policy reasons for this rule are clear: if recoverable lodestar were limited to attorney time, law firms would be inclined to assign low-level work to attorneys rather than legal support staff. The Ninth Circuit discourages such an inefficient result by recognizing the contributions of attorneys and non-attorneys. This Court will not sway from the established rule. As an added safeguard, Class Counsel has provided to this Court, for *in camera* review, detailed records underlying the summary lodestar and cost reports submitted with Plaintiffs' Fee Application. Based on its review of those records, the Court is satisfied that Class Counsel's lodestar is reasonable.

For these reasons, Mr. Rucker's objection is overruled.

The Hallerberg Objection

Objector William Hallerberg argues simply that "[f]ees, costs and expenses up to \$9,950,000 seem excessive when the damaged parties receive only \$270." Mr. Hallerberg's CHX has never failed or required repair. Thus, he has not incurred any out of pocket expenses for a past repair that would entitle him to the \$270 cash payment he argues is too small in

1 comparison to the requested attorneys' fees. Mr. Hallerberg is, however, covered by the
2 enhanced warranty protection the Settlement provides.

3 As discussed above, Class Counsel's fee award is appropriate under the lodestar-
4 multiplier analysis. In addition, recovery to Class members is not limited to the \$270 cash
5 payment for past CHX failures, but also includes automatic enhanced warranty protection for
6 all Class members. In view of the Settlement value as a whole, the Court finds that Class
7 Counsel's requested fee is reasonable and supported by Class Counsel's lodestar and
8 application of a modest multiplier well within the range of multipliers the Ninth Circuit
9 typically awards.

10 For these reasons, the Hallerberg objection is overruled.
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1 **IV. INCENTIVE AWARDS FOR THE NAMED PLAINTIFFS ARE APPROPRIATE**

2 Plaintiffs request service payments of \$3,500 each for the Class Representatives: Grays
 3 Harbor Adventist Christian School, Greg G. Bogdanovich, Mary Laforest, Bruce Kelly, Mark
 4 Neuser, Arlan Hinkelmann, Marcia Hinkelmann, Jeff Dougherty, Frank Zinn, Harvey Opaleski,
 5 and James Nogosek. The trial court has discretion to award incentives to the class
 6 representatives. *Mego Fin'l Corp. Sec. Litig. v. Nadler*, 213 F.3d 454, 463 (9th Cir. 2000). The
 7 criteria that courts have considered when determining whether to make an incentive award and
 8 the amount of the award include: (1) the risk to the class representative in commencing a class
 9 action, both financial and otherwise; (2) the notoriety and personal difficulties encountered by
 10 the class representative; (3) the amount of time and effort spent by the class representative; (4)
 11 the duration of the litigation; and (5) the personal benefit, or lack thereof, enjoyed by the class
 12 representative as a result of the litigation. *Van Vranken v. Atlantic Richfield Co.*, 901 F.Supp.
 13 294, 299 (N.D.Cal. 1995); *see also Manual for Compl. Litig.* at § 21.62 fn. 971 (2004)
 14 (enhancement payments may be “warranted for time spent meeting with class members,
 15 monitoring cases, or responding to discovery”).

16 Here, the record indicates that the Class Representatives contributed to the litigation by:
 17 (1) assisting counsel with the preparation of the complaint and amended complaints; (2)
 18 producing relevant documents and responding to other written discovery; (3) providing their
 19 furnaces for inspection; (4) staying abreast of the settlement negotiations; and (5) providing
 20 deposition, summary judgment, and class certification testimony.⁶ In light of these facts, the
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⁶ (See Declarations of Bogdanovich, Brenton, Kelly, Laforest, Nogosek, Dougherty, Opaleski, Zinn, Neuser, and Hinkelmann.)

1 Court finds that each Class Representative's contribution to the litigation and Settlement
2 process was sufficient to warrant an incentive payment award.

3 When compared to service awards in other cases, the \$3,500 payments requested here
4 are modest.⁷ In light of the Class Representatives' efforts and the risks undertaken to obtain the
5 Settlement for the Class—and the fact that no Class Member has objected to the service
6 payments—the Court hereby approves the payment of \$3,500 each to Plaintiffs Grays Harbor
7 Adventist Christian School, Bogdanovich, Brenton, Kelly, Laforest, Nogosek, Dougherty,
8 Opaleski, Zinn, Neuser, and Hinkelmann.
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11 Due and adequate notice having been given to the Class as required in this Court's
12 November 20, 2007 Preliminary Approval Order, and the Court having considered all papers
13 filed and proceedings had herein, and otherwise being fully informed, and good cause
14 appearing therefore,
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23 ⁷ See, e.g., *Carroll v. Blue Cross & Blue Shield of Mass.*, 157 F.R.D. 142, 143 (D. Mass. 1994), *aff'd* 34 F.3d 1065
24 (1st Cir. 1994) ("the class representatives shall receive payments of \$7,500 each as compensation for services
25 rendered to the class in initiating and prosecuting this action"); *Bogosian v. Gulf Oil Corp.*, 621 F. Supp. 27, 32
(E.D. Pa. 1985) (stating "the propriety of allowing modest compensation to class representatives seems obvious,"
and awarding \$20,000 to two named class representatives). See *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454,
457, 463 (9th Cir. 2000) (approving service awards of \$5,000 from a total settlement of \$1,725,000); *Razilov v.*
Nationwide Mutual Ins. Co., No. 01-CV-1466-BR., 2006 WL 3312024, *3-*4 (D. Or. Nov. 13, 2006) (approving
\$10,000 award to each class representative).

1 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that:

2 1. This Court hereby finds and concludes that due and adequate notice was
3 directed to all persons and entities who are Class Members, advising them of Class Counsel's
4 intent to seek attorneys' fees and expenses, and of their right to object thereto.⁸

5 2. A full and fair opportunity was accorded to all such persons and entities to be
6 heard with respect to the Fee Application.

7 3. The Court hereby grants Class Counsel's request for reimbursement of
8 \$1,590,583.75 in out-of-pocket costs, plus attorneys' fees in the amount of \$8,359,416.25, for
9 a combined total of \$9.95 million. The fee award represents a modest 1.24 multiplier on Class
10 Counsel's actual lodestar, which amounts to \$6,752,008.25 for work performed in this case to
11 date.⁹ A percentage-of-the-fund cross-check analysis confirms that the requested fee is
12 reasonable.

13 4. In addition to any relief they may receive under the Settlement Agreement, the
14 Court approves payment of a \$3,500 stipend to each of the Class Representatives: Grays
15 Harbor Adventist Christian School, Greg G. Bogdanovich, Mary Laforest, Bruce Kelly, Mark
16 Neuser, Arlan and Marcia Hinkelman, Jeff Dougherty, Frank Zinn, Harvey Opaleski, and
17 James Nogosek. As provided in the Settlement Agreement, Carrier shall pay the Court-
18 approved stipend to Class Counsel, in trust for the Class Representatives, within 15 business
19 days after final disposition of any appeals arising from this Order or this Court's concurrent
20 Order Granting Final Approval of Class Action Settlement.

21 5. The awarded attorneys' fees and costs, plus interest earned per the Settlement
22 Agreement, shall be transferred into an account designated by Class Counsel for the benefit of
23 Class Counsel upon entry of this Order subject to the terms, conditions and obligations of the
24 Settlement Agreement which terms, conditions and obligations are incorporated herein. The
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⁸ (See generally, Declaration of Shannon R. Wheatman.)

⁹ (See Declarations of Selbin ¶ 9, Stephens ¶ 21, Pines ¶ 25, and Woodward ¶ 6.)

1 payment of the awarded fees and costs is conditioned on the Stipulated Undertaking for
2 Repayment of Attorneys' Fees and Costs and Order submitted with Plaintiffs' Motion for
3 Preliminary Approval. The Stipulated Undertaking for Repayment of Attorneys' Fees and
4 Costs and Order has been signed by the parties thereto and is hereby ordered
5 contemporaneously with the award of attorneys' fees and reimbursement of expenses.

6 6. The awarded fees and expenses shall be directed to Class Counsel for
7 distribution in a manner that reflects each firm's contribution to the initiation, prosecution and
8 resolution of this litigation. The Court authorizes the co-lead counsel firms of Tousley Brain
9 Stephens PLLC and Lieff Cabraser Heimann & Bernstein, LLP to allocate the fee award among
10 the Class Counsel firms.

11 7. Without affecting the finality of this Order, the Court reserves continuing and
12 exclusive jurisdiction over parties to the Settlement Agreement to settle any disputes related to
13 the allocation of the costs and fees awarded by this Order.

14 IT IS SO ORDERED.

15 DONE IN OPEN COURT this 24TH day of April, 2008.

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17 RONALD B. LEIGHTON
18 UNITED STATES DISTRICT JUDGE
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